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No. 07-1050

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HARVEY P. WHITE, *et al.*,

Petitioners,

v.

HOMER A. WHITTINGTON, JR., as Trustee for the Homer A. Whittington, Jr. Revocable Trust, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents' Brief in Opposition does not address the merits of Petitioners' Petition for a Writ of Certiorari. The Mississippi supreme court did not apply federal arbitral estoppel when it cited one sentence from the Agreement and stated that "[t]he issue" is "a rather simple question of contract interpretation." Decision ¶¶ 16, 18. Respondents do not suggest otherwise.

Instead, Respondents argue that Petitioners have somehow "forfeited" their rights. Respondents' Brief in Opposition at 11. Respondents state that Petitioners "argued to the Mississippi courts that such arbitration was required under Mississippi's state law doctrine of equitable estoppel." *Id.* at 8. Respondents state:

> Nowhere did the White Defendants argue to the Mississippi Supreme Court, as they have to this Court at pages 22-28 of the Petition, that Section 2 of the Federal Arbitration Act ("FAA") mandates that the body of federal common law be followed by state courts in determining whether nonsignatories are bound by an arbitration provision by the doctrine of equitable estoppel, rather than any state law.

Id. at 12. This assertion is erroneous.

Petitioners stated in their Petition for a Writ of Certiorari ("Petition") that "In both the circuit court

(MSCR, Whittington Record 1907-11 & n.4) and in the Mississippi supreme court (opening brief at 3[6], 41-2), the individual defendants argued that the federal substantive law applies to estop non-signatories from resisting arbitration or objecting to including Leap's officers and defendants as part of the arbitration." Petition at 7. Petitioners argued below that federal arbitral law applies; that federal law recognizes two doctrines that apply to non-signatory plaintiffs and defendants; that no state law principles are involved in this dispute; that federal case law has applied estoppel to both non-signatory plaintiffs and defendants on facts less compelling than at bar; and that these federal doctrines provide that Respondents, as members of AWG, should be compelled to join the arbitration now proceeding between AWG and Petitioners.

That Petitioners did precisely this is amply reflected in Petitioners' state court briefs, which Respondents included in their Appendix. In Petitioners' opening brief filed in the Mississippi supreme court, they argued that "The FAA, 'resting on Congress's authority under the Commerce Clause, *creates a body of federal substantive law that is applicable in both state and federal courts.*' [*IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So.2d 96, 107 (Miss. 1998) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))]." *See* Respondents' Appendix ("App.") at 75 (emphasis added). Petitioners contended:

> As an initial matter, it is well established that federal law controls the issue of whether

> a non-signatory may enforce (or be bound by) an arbitration clause under the FAA. . . . [T]he United States Supreme Court has directed courts to "apply ordinary state-law principles that govern the formation of contracts" (*see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)) and the "federal substantive law of arbitrability." *Moses H. Cone*, 460 U.S. at 24.

App. 83. Petitioners differentiated between state law, on the one hand, and federal arbitral law, on the other:

> Thus, state law determines questions "'concerning the validity, revocability, or enforceability of contracts generally,'" but the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." [*Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (quoting *Moses H. Cone*, 460 U.S. at 24)].

App. 83-84. Petitioners argued that the issue presented below did not invoke state law questions of contract formation or validity:

> Because the determination of whether a non-signatory may enforce (or be bound by) an arbitration clause "'presents no state law question of contract formation or validity,' a court should 'look to the federal substantive law of arbitrability to resolve th[ese] question[s].'"

App. 84 & n.22 (alteration in original) (citation omitted).

Petitioners then proceeded to argue for application of federal equitable estoppel. *See* App. 82-90 (citing, *e.g.*, *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 526-31 (5th Cir. 2000); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1997); *Mississippi Fleet Card, L.L.C. v. BilStat, Inc.*, 175 F. Supp. 2d 894, 896-901 (S.D. Miss. 2001)).[1] Petitioners also argued for application of the direct benefits theory of federal estoppel. *See* App. 90-94 (citing, *e.g.*, *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004); *Int'l Paper*, 206 F.3d at 416; *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 351-53 (2d Cir. 1999)).[2]

Petitioners acknowledge that they cited decisions from the Mississippi supreme court. Respondents state that Petitioners argued below that "'[t]he law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another.'" Respondents' Brief in Opposition at 11-12 (alteration in original) (citation omitted). Respondents neglect to include the next sentence, which reveals the context of Petitioners' statement: "Indeed, this [Mississippi

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[1] *See also* Petitioners' reply brief filed in the Mississippi supreme court. App. 215-20.

[2] *See also* App. 220-24.

supreme] Court 'has long observed a policy favoring agreements to arbitrate.'" App. 74 (citation omitted). Observing a policy favoring arbitration is not the same as applying federal arbitral estoppel. While Petitioners cited to *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2005), they argued that the decision "does not apply here." *See* App. 88-89. Petitioners also distinguished Mississippi supreme court decisions that evaluated third party beneficiary theories, stating "the third party beneficiary doctrine . . . is very different from equitable estoppel." App. 89 (internal citation omitted).

Respondents also argue that Mississippi law is consistent with federal law and that there is no "meaningful conflict" between state and federal courts. Respondents' Brief in Opposition at i, 16-17. Respondents then focus solely on the language of the agreement at issue. *Id.* at 18-19. This is the same analysis under state law principles that the Mississippi supreme court applied. As Petitioners argued below, federal estoppel does not focus on the contractual language:

> Under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

App. 89-90 (citing, *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 362 (5th Cir. 2003)); *see E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 n.7 (3d Cir. 2001).

Examining the parties' conduct is an analysis appreciably distinguishable from an examination of the parties' contractual provisions. Respondents do not argue, because they cannot, that the Mississippi supreme court below followed federal arbitral estoppel law. The reason is that the Mississippi supreme court has affirmatively chosen to apply state law principles rather than federal arbitral law. That choice is deserving of this Court's review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: March 19, 2008

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